No. 15727

In the United States Court of Appeals for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

CALIFORNIA DATE GROWERS ASSOCIATION, RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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AUTHORITIES CITED

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JURISDICTION

This case is before the Court on petition of the National Labor Relations Board pursuant to Section 10 (e) of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C. 151, *et seq.*), for enforcement of its order issued against respondent on June 21, 1957, following the usual proceedings under Section 10 of the Act. The Board's decision and order (R. 15–34)[1] are reported at 118 N. L. R. B. No. 29. This Court has jurisdiction of the proceed-

[1] Wherever in a series of record references a semicolon appears, references preceding the semicolon are to the Board's findings and succeeding references are to the supporting evidence.

ings since the unfair labor practices occurred in Indio, California, within this judicial circuit.[2]

I. The Board's findings of fact and conclusions of law

The Board found that respondent violated Section 8 (a) (3) and (1) of the Act by reducing or abolishing the seniority of unreplaced economic strikers after a strike, as a penalty for striking, and violated Section 8 (a) (5) and (1) by refusing to bargain with the certified representative of its employees. The subsidiary facts upon which these findings rest may be summarized as follows:

A. The nature of respondent's operations and hiring system

Respondent's business of processing and packaging dates is seasonal, normally running from late August or early September to the following spring (R. 36; 135–137). The number of its employees varies with prevailing crop conditions both during the season and from year to year (R. 36; 135–136). At the beginning of the season a small force packs dates carried over in storage from the previous season (R. 36; 138–139). As the current crop matures, the work force increases until the seasonal peak in late November or December, when respondent is usually able to employ all qualified persons seeking employment (R. 36; 157–158). After the first of the year the work force tapers off again and most em-

[2] Respondent, a California corporation with a packing house in Indio, California, processes and packages dates and annually ships over $50,000 worth of its products to points outside the State of California. No jurisdictional issue is presented (R. 35–36).

ployees are laid off by March or April, although a few may continue to work as late as May (R. 36; 158–159).

Prior to 1952 respondent maintained a priority list of employees based on payroll records of the previous season and accorded those on the list, who applied for work at the start of a season, preferential hiring status over other applicants for employment (R. 10, 36–37, 51; 142–143, 289–290). In October 1952 respondent and the certified representative of its employees [3] entered into a collective bargaining agreement which made departmental seniority the determining factor for layoffs and rehirings, with the proviso that no employee was eligible for seniority status unless he had worked 12 weeks or 51% of the previous or current season (R. 6–7, 12, 38–39; 280, 140–141). In November 1952 respondent compiled a seniority list, which included the names of employees on the old priority list plus those who had obtained seniority under the terms of the contract, and posted a copy in the packing shed (R. 51; 227–229, 289–90). Although the union contract expired on July 1, 1953, respondent followed the 1952–1953 seniority list in recruiting employees during the fall of 1953 (R. 51; 8, 12, 227–231). Employees on the list were notified when respondent intended to begin operations and were advised to submit applications so that respondent might determine their current availability for

[3] The Union was then known as United Fresh Fruit and Vegetable Workers Local Industrial Union 78, CIO, but subsequently changed its name to United Packinghouse Workers of America, AFL–CIO, Local Union No. 78 (R. 37; 199).

work (R. 51–52; 230–231). As employees were needed, respondent recalled all such applicants in the order of their position on the seniority list before hiring applicants not on the list (R. 51–52; 231–232, 157–159, 187). At the end of the season, employees were also laid off according to the seniority list (R. 158, 246).

B. Respondent reduces the security of strikers to punish them for striking

On December 1, 1953, following an impasse in negotiations for a new contract, the Union called a strike against respondent (R. 39, 52; 8, 12). Respondent continued to operate with non-strikers and some replacements (R. 39, 52; 8, 12, 234, 281).[4] On December 8, the Union notified respondent that it was terminating the strike and that the strikers would "return to work immediately" (R. 52; 104–105, 281). Substantially all the strikers reported at the packing shed the same day to sign an availability list (R. 39–40; 235–236, 256). While the amount of work was sharply curtailed after the strike, because of the loss of the Christmas market and a poor date crop, respondent reinstated all strikers for whom work was available in the order of their position on the 1952–53 seniority list (R. 40, 52; 236–237, 239–

[4] Respondent replaced some 35 employees during the strike. Most of the replaced strikers were comparatively new employees and had no seniority rights under the collective bargaining contract. The remainder had worked long enough to acquire seniority rights under the contract. The Board recognized, as to any striker who had been replaced, either status or non-status, that he had no further right to employment (R. 25–26, 52, n. 8). Consequently there is no issue here as to either category of replaced strikers (R. 266).

245, 250, 167, 292, 192, G. C. Exh. 3).[5] Twelve former strikers, who were offered work on a new night shift on January 18, refused the offer for personal reasons (R. 18, 40; 236–241, 188–189, G. C. Exh. 3). Some former strikers who were on the seniority list, and all who were not on the list, received no more work for the rest of the season (R. 20, 22, 40; 265–266, 271 G. C. Exh. 2–0, 4).

Virtually at the end of the 1953–54 season, about March 18, respondent prepared a new seniority list comprising the names of employees who worked during and after the strike (R. 18–23, 52–53; 246–247, G. C. Exh. 4). Reinstated strikers were dropped to the bottom of the list, their seniority, like that of new employees, dating from the day of their return to work after the strike (R. 52–53; 245 G. C. Exh. 4). Strikers not reinstated, who had seniority status under the 1952–53 list, were excluded from the new list altogether (R. 18, 64–65; 265–266, 269, 271 G. C. Exh. 4, G. C. Exh. 2–0).[6] The March 18, 1954 list

[5] Certain exhibits, consisting mainly of lengthy lists of employees, although designated for printing by the Board, were not included in the printed Transcript of Record. Since we do not believe that there is any controversy about the facts which these exhibits were intended to verify, we are not requesting that the missing exhibits be printed in a Supplemental Transcript of Record. Should it develop that we are in error in this regard and should the Court desire it, we will have such a Supplemental Transcript of Record printed. We refer to these unprinted exhibits, which have been filed with the Court, by their exhibit numbers.

[6] The Board made no findings as to the precise number of employees affected by respondent's changed seniority policy. However, the documentary evidence—i. e., respondent's hiring records and seniority lists—shows roughly that there were about

was first used in the 1954–55 season (R. 23, 64–65; 249–250, 253). Employees on the list were the first to be called to work in the fall, and the last to be laid off when the work force was reduced (R. 52–53; 253, 277–278).

Respondent did not inform any employee about its new seniority policy prior to March 18 (R. 21; 249, 284–286). During the strike some employees then at work had come to General Manager Wright and expressed concern for their job security. Wright told them they had become the "nucleus of our work force" and "would be maintained if and when the strike was terminated," but made no commitment as to seniority (R. 21; 281–283, 286). Wright did not interview any employees hired during the strike at the time they were hired, and did not instruct his subordinates to promise them preferential seniority (R. 22–23; 291). Nor did Wright or any other representative of respondent mention any loss of seniority to those strikers who were reinstated after the strike (R. 21, 59; 285–286). At the hearing Wright attributed his

290 employees at work when the strike occurred, of whom 130 had seniority status (R. 265–266, G. C. Exh. 3, 2–0). About 105 of the employees with status went on strike, 29 of them were reinstated but subsequently had their seniority reduced, approximately 68 were deprived of their seniority status altogether, and 8 were replaced (G. C. Exh. 2–0, 4, 3). In connection with the representation proceeding, respondent conceded that except for these 8, none of the strikers with seniority status was replaced by any employees taken on during the strike (R. 123–124; Exh. 2–0). It should be noted that the 1952–53 seniority list used for determining voting eligibility marks 8 employees as replaced, while the Regional Director's Report on Challenges is concerned only with the 5 who attempted to vote in the election.

silence to a desire not "to agitate that situation at the time they return" because, as he expressed it, "You are interested in business continuing" (R. 22; 286). Respondent's personnel chief, Florence Hawkins, who had charge of the seniority list and the recruiting of employees, was not apprised of the new policy until February 1954 (D. 6, 59; 284–285). When one of the strikers inquired concerning her seniority status in January 1954, Hawkins replied that she "did not know" and "couldn't tell her a thing about it" (R. 23; 246). The old 1952–1953 seniority list remained posted after the strike and was used by Hawkins in recalling strikers during the balance of the 1953–1954 season (R. 23, 59; 237, 239, 249).

Upon the basis of the foregoing facts and the entire record, the Board found that respondent reduced or abolished the seniority of the strikers after the strike in order to punish them for striking. In so finding, the Board rejected respondent's contention that it adopted its new seniority policy for economic reasons as a means of continuing business during the strike. The Board accordingly concluded that respondent's conduct was violative of Section 8 (a) (3) and (1) of the Act (R. 18–23).[7]

[7] The Trial Examiner had found that respondent's illegal motivation was not proved, and that therefore its reduction of the strikers' seniority below that of nonstrikers and replacements was not in violation of the Act. He found, however, that respondent violated Section 8 (a) (3) and (1) of the Act by depriving strikers not reinstated after the strike of all seniority rights (I. R. 8–15). Both the Board and the Trial Examiner concluded that there was no substantial evidence that respondent, in requiring aptitude tests for some employees during the 1954–1955 season, applied the test discriminatorily against the strikers (R. 26, 68–72).

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C. Respondent's refusal to bargain

1. *The consent election agreement*

On December 9, 1953, respondent filed a representation petition with the Board pursuant to Section 9 (c) (1) (B) of the Act, and thereafter entered into a consent election agreement with the Union (R. 37; 100–103, 105–111). This agreement provided that the employees eligible to vote "shall be all persons who were employed in the bargaining unit set forth above [8] during the last complete payroll period in January 1954, and including all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or been discharged for cause, and have not been rehired or reinstated prior to the date of the election" (R. 47–48; 109–110). The agreement further provided that the election should be conducted "in accordance with the National Labor Relations Act, the Board's Rules and Regulations, and the customary procedures and policies of the Board, provided that the determination of the Regional Director shall be final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election" (R. 105–106).

[8] The agreement provided that the appropriate unit included "all packing shed employees employed by the Employer at its Indio, California packing shed; excluding all office and clerical employees, and also excluding watchmen, guards, supervisors, and professional employees as defined in the National Labor Relations Act, as amended" (R. 109).

2. The election

The election was held on February 18, 1954. Of the 204 employees voting there were 69 votes for the Union, 70 against, and 65 ballots were challenged by either respondent or the Union (A. 41; 112, 116). Among the challenged ballots were those of the 12 former strikers who declined night shift work after the strike, and who, according to respondent, had quit their employment. After an investigation, the Board's Regional Director issued a Report on Challenges in which he overruled the challenges to their ballots (R. 40–41; 126–130).

3. Respondent's objection to the counting of the ballots of the 12 strikers who declined night work

Thereafter respondent filed exceptions, objecting only to the disposition of these twelve ballots, and requested a hearing (R. 41). Following the hearing and after receiving briefs from both respondent and the Union, the Regional Director issued a Supplemental Report on Challenges in which he again concluded that the 12 employees were entitled to vote (R. 41, 200–205). Upon the basis of the record at the hearing, the Regional Director found as follows:

Each of the 12 former strikers who cast a challenged ballot had status on the 1952–1953 seniority list and applied unconditionally for reinstatement on December 8, 1953 (R. 202; 144, 126). At the time of their application there was insufficient work to permit their recall (R. 202). On January 16, 1954, as noted above, respondent added a night shift and

offered this work to the 12 employees at issue (R. 200; 126, 143–144). All twelve had been on the day shift prior to the strike and each declined the offer of night work for personal reasons (R. 202; 126–130, 143–144, RM Tr. 97). Some of them simultaneously sought day work (R. 202; 126, 172, 189, 194, 195–196).

Normally when adding a night shift, respondent recruited at least a nucleus of the night crew from employees working on the day shift, but the day shift employees were free to refuse the transfer without being laid off, discharged, or regarded as having quit their employment (R. 203; 153, 171, 173–174, 176–177, 180, 182, 184).[9] Moreover, the employment applications which respondent required employees to fill out each season, contained a question as to whether the employee was willing to accept night work (R. 202–203; 144–145). Employees who answered no, or left the question blank, were nevertheless considered for and given day work (R. 203; 144–145).

4. *The Regional Director's rejection of respondent's objection and his certification of the Union*

In view of the foregoing and the absence of affirmative evidence as to any act or word on the part of the

[9] General Manager Wright testified that prior to the institution of the seniority list employees willing to work nights, short weeks, and during hot weather were given a preferential place on priority list with the result that they were called to work sooner at the beginning of a season and retained longer at the end of the season (R. 146–147, 164–165). He testified further: "I wish to point out then * * * that a person who wasn't willing to work nights, wasn't willing to work shorter weeks, wasn't willing to work during hot weather, that that person wasn't laid off or fired because of it but they were the last hired and the first to be laid off" (R. 165).

12 employees, which would establish an intent to resign from or abandon their employment status, the Regional Director concluded that the declination of night work did not constitute a quitting of their employment (R. 204–205). Since respondent admittedly did not discharge them for their action (R. 204; 166), and they had not quit, the Regional Director found that they were eligible to vote under the terms of the consent election agreement and directed that their ballots be opened and counted (R. 204–205).[10]

Including the ballots of the 12 strikers who had declined night shift work, the Union had a majority of 82 to 78, and the Board, on October 19, 1954, accordingly issued a revised Tally of Ballots to this effect (R. 214). On October 21, 1954, the Regional Director certified it as the bargaining representative of respondent's employees (R. 41; 261–217).

5. *Respondent's further objection to the counting of the ballots in its absence*

Respondent then filed further objections to the election on the ground that the challenged ballots were opened and counted in its absence (R. 219–220). The facts upon which this objection is based are set forth in a letter the Regional Director wrote respondent's

[10] The Regional Director also rejected respondent's contention that two of these employees who gave illness as their reason for declining night work, lost their employee status because of their failure to apply for a leave of absence (R. 205–206). Respondent did not discharge them, and the Regional Director found no credible evidence in the record that employees were required to obtain leaves of absence or sick leave while they were laid off with no real expectation of being recalled for six or more months (R. 205).

counsel following his investigation of the matter and were in essential point confirmed by General Manager Wright at the subsequent hearing in this case (R. 17, 44–45; 221–224, 296–299):

> As to the failure of you or your client to be present at the time the ballots were counted, you will recall that the Supplemental Report on Challenges designated October 11, 1954 at 2:00 p. m. at this office as the time and place for the counting of these ballots. Subsequently, on October 13, 1954, you requested an additional week before the count was made. On October 14, Field Examiner Helbling addressed a letter to you in which he indicated, among other things, that the count of the challenged ballots would be put over until 2:00 p. m,. October 19, 1954 at this office. He also pointed out that Field Examiner Carl Abrams would, in his absence, conduct the conference. On October 19, you addressed a letter to me, in which you stated, in part, that the appearance of a representative of the Employer at our Office on October 19, 1954, at 2:00 p. m., pursuant to our order that the challenged ballots be opened and counted, should not be regarded as a waiver by the Employer of his objections to the challenges.
>
> From the personnel in this office who were involved in the matter, I learned that the union representative arrived at approximately 1:50 p. m. to be present for the purpose of observing the count; that at approximately 2:05 p. m., Mr. Abrams asked the union representative to agree to a delay until 2:15 p. m., with the

understanding that, if at that time no representative of the Company had appeared, the ballots would be opened. The union representative agreed to this. At 2:15 p. m., no person had appeared and asked for Mr. Abrams or identified himself in connection with this case. Mr. Abrams then inquired at the reception desk for you and was advised that you had not yet arrived. It appears that a gentleman did appear at the reception desk at approximately 1:45 p. m. and informed the receptionist that he was to meet you here. He inquired if you had arrived and was advised that you had not. He did not state to our receptionist his name or that it was a Labor Board matter with respect to which he was meeting you here. Mr. Abrams, upon being informed by the receptionist that you were not here, asked a second Field Examiner to witness the opening and counting of the ballots, which was done in your absence.

It appears that, shortly after 2:30 p. m., you appeared and were informed by the receptionist that there was a gentleman waiting for you; that you, together with the other person, presumably Mr. Wright of the Company, then walked out of the office. In the interim, Mr. Abrams completed the count. Upon being advised by the receptionist that you had just arrived and stepped out with someone, Mr. Abrams, upon your return, explained to you the above facts and displayed the ballots to you as well as the tallies.

The Regional Director concluded that none of his personnel had acted in an arbitrary manner (R. 223–224).

6. Respondent's refusal to recognize the certification

Thereafter, respondent admittedly refused to bargain with the Union, taking the position that the certification was invalid because the Regional Director (1) was arbitrary and capricious in ruling that the 12 employees who declined night work were eligible to vote, and (2) permitted the challenged ballots to be opened and counted in the absence of respondent (R. 16–18, 42–43; 260–262). The Board, after examing the record in the representation proceeding, found that the Regional Director's ruling with respect to the challenged ballots was reasonable and supported by substantial evidence (R. 16–17, 45–51). The Board further found that the counting of the ballots in respondent's absence was not arbitrary or capricious under the circumstances described by the Regional Director and confirmed by General Manager Wright at the unfair labor practice hearing (R. 17, 44–45; 297–299, 220–224). Concluding that the Union's certification was valid and proper, the Board found that respondent's refusal to bargain was accordingly violative of Section 8 (a) (5) and (1) of the Act (R. 44–45, 51).

II. The Board's order

The Board ordered respondent to cease and desist from the unfair labor practices found and from in any other manner infringing upon its employees' exercise of their rights under Section 7 of the Act (R. 27–28). Affirmatively, the Board ordered respondent to bargain with the Union upon request; to rescind its discriminatory seniority policy; to restore to their

prestrike seniority all unreplaced strikers on the 1952–1953 seniority list who requested reinstatement, except the 12 employees who declined night work; to restore these 12 to reduced seniority at the end of the seniority list;[11] to offer the discriminatees reinstatement on the basis of their restored seniority and make them whole for any loss of employment suffered because of the discriminatory seniority policy, and to post appropriate notices (R. 28–30).

SUMMARY OF ARGUMENT

I. The Board properly rejected respondent's contention that the certification was invalid. The Regional Director's determinations in the underlying representation proceeding were made "final and binding" by the consent election agreement and "can be set aside only where they are arbitrary or capricous" (*N. L. R. B.* v. *Carlton Wood Products,* 201 F. 2d 863, 866 (C. A. 9)). There is no basis for the claim that the Regional Director was arbitrary in permitting the 12 strikers who refused night work to vote in the election. Similarly without foundation, under the circumstances of this case, is respondent's further contention that the Regional Director was arbitrary in permitting the challenged ballots to be opened and counted in respondent's absence. Accordingly, the Board properly found that respondent violated Section 8 (a) (5) and (1) of the Act by refusing to bargain with the certified representative of its employees.

[11] In remedying the discrimination against these 12 employees, the Board took into account Manager Wright's testimony that in past seasons employees refusing night work were the last hired and the first laid off (R. 26; 165).

II. Respondent, by means of its March 18 seniority list, deprived the returned strikers of their pre-strike seniority, and terminated the employment status of all the other unreplaced strikers for whom there was no work after the strike. The record establishes that respondent's motivation for this action was to punish the strikers because they chose to strike rather than to work. Accordingly, respondent's discrimination against these strikers not only infringed their right to engage in concerted activities for their mutual aid and protection, in violation of Section 8 (a) (1), but also constituted unlawful discouragement of union membership in violation of Section 8 (a) (3) of the Act.

The decision of this Court in *N. L. R. B.* v. *Potlatch Forests, Inc.,* 189 F. 2d 82, 86, does not justify such discrimination against strikers. *Potlatch* involved the institution of a superseniority policy during a strike while the employer was in the process of replacing strikers. In this case none of the strikers here involved had been replaced. Respondent had no need to replace the strikers here involved because a large number of employees did not join the strike and because of a curtailment of operations which occurred simultaneously with the strike. In sum, the economic justification asserted for the institution of the discriminatory superseniority policy in *Potlatch*—the need to replace strikers in order "to carry on the business"—thus did not exist in the instant case. Furthermore, unlike *Potlatch,* respondent here did not invoke its new seniority policy until after the strike had ended, and, as stated above, its purpose

in doing so was to punish them for striking. In these circumstances, such discrimination, "after the strike, when there is no necessity for such action to keep [the] plant in operation," was clearly violative of Section 8 (a) (3) and (1) of the Act. *Olin Mathieson Chemical Corp.* v. *N. L. R. B.,* 232 F. 2d 158, 161 (C. A. 4), affirmed 353 U. S. 1020.

ARGUMENT

I. The Board properly rejected respondent's contention that the certification was invalid

A. Preliminary statement

Respondent's admitted refusal to bargain with the Union narrows the bargaining issue to the validity of the certification and more specifically to the finality of the Regional Director's rulings in the representation proceeding with respect to the eligibility of voters and the procedure for counting ballots. As previously noted, p. 8, the consent election agreement between the parties made the Regional Director's determination "final and binding upon any question, including questions as to the eligibility of voters, raised by any party hereto relating in any manner to the election." Under settled law "Determinations by a Regional Director acting pursuant to a consent election agreement which specifies that such determinations will be final and binding can be set aside only where they are arbitrary or capricious" (*N. L. R. B.* v. *Carlton Wood Products,* 201 F. 2d 863, 866 (C. A. 9)).[12]

[12] See also, *N. L. R. B.* v. *Standard Transformer Co.*, 202 F. 2d 846, 848–849 (C. A. 6); *N. L. R. B.* v. *General Armature*

Respondent does not, and could not, claim that there was anything arbitrary or capricious in the procedure followed by the Regional Director in ruling on the challenged ballots. The Regional Director not only conducted an administrative investigation but also afforded respondent full opportunity to submit evidence at a formal hearing and to amplify its position in a brief (*supra,* pp. 9–11). Respondent's attack goes solely to the merits and consists of an assertion that there is no probative evidence to support the Regional Director's determination that the 12 employees who declined night work were eligible voters.

B. Respondent has failed to show that the Regional Director was arbitrary in permitting the 12 strikers who declined night work to vote

As noted above, respondent contended that the 12 strikers who declined night work thereby quit their jobs and were therefore ineligible to vote under the terms of the consent election agreement. The agreement, it will be recalled, defined those eligible to vote as including not only the unusually small number of employees on the payroll but also "all persons whose names appear on the 1953 seniority list; but excluding any such persons who have been permanently replaced and those employees who have quit or have been discharged for cause" (*supra,* p. 8). The 12 employees at issue were all listed on the 1953 seniority list and respondent conceded that they had not been replaced or discharged (*supra,* pp. 9, 11). They were therefore clearly eligible to vote unless, as re-

Co., 192 F. 2d 316, 317 (C. A. 3), certiorari denied, 343 U. S. 957; *Semi-Steel Casting Co.* v. *N. L. R. B.*, 160 F. 2d 388, 391 (C. A. 8), certiorari denied, 332 U. S. 758.

spondent contended, they had quit their employment by their refusal of night work after the strike.

Apart from the bare fact of this refusal, the record contains no affirmative evidence that the employees said or did anything which would indicate an intention to abandon their employment status.[13] All 12 had been on the day shift prior to the strike and had expressed a desire to continue in that employment by applying for reinstatement (*supra,* pp. 9, 10). Although they turned down the night shift for personal reasons, none of them ever declined a post-strike offer of work on the day shift. Indeed, some of them coupled their rejection of night work with a request for day work (*supra,* p. 10).

Moreover, it was respondent's prior practice to permit daytime employees to decline night shift work without loss of their status as employees (*supra,* p. 10). General Manager Wright testified that in past seasons daytime employees who did not accept such assignments were the last hired and the first to be laid off, but admitted that this meant only relative position on the seniority list and not employees status as such (R. 17; 165). The record also shows that in previous seasons applicants for

[13] Contrary to respondent's assertion, the circumstance that the two employees who declined night work because of illness had not obtained a leave of absence, does not establish an intention to quit on their part. Since they were laid off with no real expectancy of being recalled until the following season, they may well have considered sick leave unnecessary. While the omission might have justified respondent in discharging them, respondent does not claim to have done so.

employment who had expressed an unwillingness to work nights on their application blanks, were nevertheless considered for and given work on the day shift (*supra,* p. 10). Consequently, the employees had no cause to believe that respondent would regard their rejection of night work as a resignation.

The foregoing evidence furnishes a reasonable basis, we submit, for the Regional Director's determination that the 12 employees had not voluntarily quit. While their refusal to accept night work might have furnished grounds for discharge, respondent does not contend that it terminated their employment.

Respondent's claim that the Regional Director's action was arbitrary and capricious rests on various grounds. First respondent asserts that only four of the 12 employees testified at the hearing and that consequently there is an inadequate basis for the Regional Director's determination that the others had not quit their jobs. However, the fact that the employees did not testify is in no way attributable to the Regional Director. The hearing was held at respondent's request to permit it to adduce evidence that the employees had quit and therefore should not have been permitted to vote. If the testimony of these employees would have supported respondent's position, respondent had the opportunity and the burden of producing them as witnesses. The assertion in the hearing on objections that the 12 employees had quit was in the nature of "an affirmative defense" and hence was "in no sense a part of the Board's case". *N. L. R. B.* v. *J. G. Boswell,* 136 F. 2d 585, 597 (C. A. 9). See also *N. L. R. B.* v. *Cambria Clay*

Products Co., 215 F. 2d 48, 56 (C. A. 6); *Stewart Die Casting Corp.* v. *N. L. R. B.*, 114 F. 2d 849, 856 (C. A. 7), certiorari denied, 312 U. S. 680. Under all the circumstances, and particularly in view of respondent's failure to sustain its burden of proving that the 12 employees, by refusing night work, intended to quit, the Regional Director's determination manifestly cannot be said to be arbitrary.

Before the Board respondent also asserted that three of the employees did not apply for work during the following season,[14] and urged that this showed that these employees intended to quit when they refused night work. However, this failure to apply did not occur until several months after the hearing on the challenged ballots and hence can have no bearing on the question here, which is whether the Regional Director's appraisal of the record before him was arbitrary or capricious.

And, finally, respondent points to the fact that some of the employees had worked nights in previous seasons or had indicated on their applications that night work would be acceptable. But this factor alone did not compel the Regional Director to infer that in refusing such work in January 1954, they quit. As the Trial Examiner observed (R. 48–49), "circumstances change with the times and in January 1954, they may have been confronted with a situation of personal convenience entirely different" from that of previous

[14] Although respondent placed the number at five, two of the names specified by it—Virginia Luna and Celia Vasquez—are not included among the 12 employees whose ballots were challenged (R. 200).

seasons. In any event, "proof that the Regional Director's determination had been 'erroneous' or 'incorrect' would not demonstrate arbitrary action" (*Elm City Broadcasting Corp.* v. *N. L. R. B.,* 228 F. 2d 483, 485–486 (C. A. 2)). For "a mistake of honest judgment does not constitute an arbitrary or capricious decision" (*N. L. R. B.* v. *Volney Felt Mills,* 210 F. 2d 559, 560 (C. A. 6)).[15]

C. Respondent has failed to show that the Regional Director was arbitrary in permitting the challenged ballots to be opened in its absence

As detailed at pp. 12–13, *supra,* despite adequate notice to the parties that a meeting for the opening of the challenged ballots would be held in the Board's Regional Office at 2:00 p. m., October 19, 1954, respondent's counsel did not appear until shortly after 2:30 p. m., and respondent's general manager, although present on time, nevertheless did not identify himself to the receptionist or indicate his desire to attend the meeting as respondent's representative (*supra,* p. 13). Respondent's absence during the count was therefore attributable to its own neglect and not to any arbitrary action on the part of the Regional Director. Moreover, the Board's agent made a reasonable effort to give respondent fair play. He delayed the counting of the ballots until 2:15 p. m. and gave respondent's counsel, when he did arrive,

[15] Indeed, the rule laid down by the Supreme Court with respect to a contractual arrangement indistinguishable from the consent election agreement here, is that the decision of a department head on a question of fact, made "final and conclusive" by a government contract, may be set aside on judicial review only on proof of fraud. *U. S.* v. *Wunderlich,* 343 U. S. 98.

an opportunity to examine the ballots as well as the tallies (*supra,* p. 13). Neither then nor before the Board did respondent dispute the fact that the count was accurate and *bona fide* (R. 297). In this setting, we submit, it can hardly be said that any prejudice resulted to respondent from its self-imposed absence. The demands of due process "are not technical, nor is any particular form of procedure necessary" (*Inland Empire District Council* v. *Millis,* 325 U. S. 697, 710). "The Constitution protects procedural regularity, not as an end in itself, but as a means of defending substantive interests" *Fay* v. *Douds,* 172 F. 2d 720, 725 (C. A. 2). *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 350–351.

The Board properly concluded, therefore, that the Regional Director did not act arbitrarily or capriciously in certifying the Union. Respondent's unjustified refusal to bargain was accordingly violative of Section 8 (a) (5) and (1) of the Act.

II. Substantial evidence supports the Board's finding that respondent, in violation of Section 8 (a) (3) and (1) of the Act, reduced or abolished the seniority of unreplaced economic strikers after the strike as a penalty for striking

The statutory protection vouchsafed by the Act to employees who engage in peaceful strikes over terms and conditions of employment is not open to question. "Congress safeguarded the exercise by employees of 'concerted activities' and expressly recognized the right to strike." *International Union, U. A. W.* v. *O'Brien,* 339 U. S. 454, 457; *Amalgamated Association* v. *W. E. R. B.,* 340 U. S. 383, 389, 404; *N. L.*

R. B. v. *International Rice Milling Co.,* 341 U. S. 665, 672, n. 6. By Section 2 (3) of the Act it preserved to such strikers their status as employees, and by Section 7 it declared that employees "shall have the right" to engage in "concerted activities" for "mutual aid or protection." *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 33, 344–345. To implement this right, Congress, in Section 8 (a) (1), forbade abridgement by an employer of the rights guaranteed by Section 7; and in Section 8 (a) (3) it forbade discrimination in employment to "discourage participation in union activities as well as to discourage adhesion to union membership." *Radio Officers' Union* v. *N. L. R. B.,* 347 U. S. 17, 29–42.[16] The protection of Section 8 (a) (3) extends to "all elements of the employment relationship which in fact customarily attend employment and with respect to which an employer's discrimination may as readily be the means of interfering with employees' right of self-organization as if these elements were precise terms of a written contract of employment." *N. L. R. B.* v. *Waterman S. S. Corp.,* 309 U. S. 206, 218.

It can scarcely be denied that respondent's March 18, 1954, seniority list discriminated against those employees who had joined in the strike, and that a necessary consequence of such disparate treatment,

[16] Special legislative solicitude for the right to strike was again expressed in Section 13, which states that "Nothing in this Act, except as specifically provided for herein, shall be construed so as * * * to interfere with or impede or diminish in any way the right to strike * * *." *N. L. R. B.* v. *International Rice Milling Co.*, 341 U. S. 665, 673; *Mastro Plastics Corp.* v. *N. L. R. B.*, 350 U. S. 270, 284.

based solely on participation in concerted activity which the Act protects, would be to discourage resort to strike action in the future. *Gaynor News Co., Inc.* v. *N. L. R. B.*, 347 U. S. 17, 46. As set forth above, more than three months after the strike was over respondent revised its seniority list to give the non-strikers and replacements priority over those strikers who had been reinstated, treating the latter as new employees hired for the first time after the strike. In addition, respondent excluded from the revised list all previously listed strikers who had not been called back after the strike, *supra,* p. 5. But since these strikers had not been replaced, their status was that of laid off employees who would have retained their seniority listing under respondent's normal employment procedures (*supra,* pp. 3–4).[17]

As to the nonreinstated strikers, respondent, by eliminating them from the seniority list altogether, terminated their employment status—in other words, discharged them. Such a discharge of unreplaced strikers for having gone out on strike, was unquestionably violative of Section 8 (a) (1) and (3) of the Act. As this Court has repeatedly held, "the discharge of economic strikers prior, as here, to the time their places are filled constitutes an unfair labor practice". *N. L. R. B.* v. *Globe Wireless, Ltd.*, 193 F. 2d 748, 750 (C. A. 9); *N. L. R. B.* v. *Buzza-*

[17] There is no issue here as to the five or more strikers who were replaced during the strike. Their right to reinstatement terminated when they were replaced (R. 25, 64–65). *N. L. R. B.* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346.

Cardozo, 205 F. 2d 889, 890 (C. A. 9), certiorari denied, 346 U. S. 923; *N. L. R. B.* v. *Cowles Publishing Co.,* 214 F. 2d 708, 710–711 (C. A. 9), certiorari denied, 348 U. S. 876; *N. L. R. B.* v. *McCatron,* 216 F. 2d 212, 204–215 (C. A. 9), certiorari denied, 348 U. S. 943.

Respondent's treatment of the returned strikers was no less unlawfully discriminatory. By taking these unreplaced strikers back and three months later according them seniority only from the date of their return to work after the strike, respondent was in effect discharging them and rehiring them as new employees. And having been deprived of all prior seniority because of their participation in the strike, the returned strikers inevitably stood to suffer future loss of employment because, under respondent's normal procedures, seniority governed the order of layoffs and recalls in respondent's fluctuating seasonal operations (*supra,* pp. 3–4). Respondent's action with respect to the returned strikers thus was equally violative of their statutory right to engage in concerted activity for their mutual aid and protection, free from employer discrimination on this account.

Before the Board respondent sought to justify its discrimination against the strikers on the basis of this Court's decision in *N. L. R. B.* v. *Potlatch Forests, Inc.,* 189 F. 2d 82. In that case, however, this Court rejected the view that "the true purpose motivating *Potlatch's* adoption of the strike seniority policy was a desire to penalize those members of the Union who had most persistently asserted the Union's

demands" (189 F. 2d, at 86). The Court held that "Potlatch exhibited no anti-union prejudices * * *" and that its action was "consistent with the legitimate exercise of the employer's 'right to protect and continue his business by supplying places left vacant by strikers'" (*id.* at 85–86). As shown below, we believe that the Board's finding in the instant case, that respondent's "purpose in reducing the seniority of the strikers was to punish them because they chose to strike rather than work" (R. 19–23), is supported by substantial evidence. Accordingly, the Board's decision here is not in conflict with that of this Court in *Potlatch.* Rather it parallels the decision of the Fourth Circuit, affirmed by the Supreme Court, in *Olin Mathieson Chemical Corp.* v. *N. L. R. B.,* 232 F. 2d 158, affirmed 353 U. S. 1020. In the latter case the Courts upheld the Board's determination that the employer's institution, after the strike ended, of a seniority policy which discriminated against the strikers was motivated by a purpose to penalize the strikers, and was therefore in violation of Section 8 (a) (3) and (1) of the Act.

The *Potlatch* decision rests on the holding of the Supreme Court in *N. L. R. B.* v. *Mackay Radio & Telegraph Co.,* 304 U. S. 333, 345–346, that an employer may "replace the striking employees with others in an effort to carry on the business" during the strike, even though such measures might tend to inhibit the striking employees in the exercise of their statutory rights. The Supreme Court stated (304 U. S. at 345–346):

> * * * an employer, guilty of no act denounced by the statute, had [not] lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment, in order to create places for them. The assurance by [the employer] to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. [Footnote omitted.]

Thus under *Mackay* and *Potlatch,* it is established that an employer has a right to *replace* strikers, if necessary "to protect and continue his business." Neither case, however, supports the proposition that an employer may, without regard to legitimate business needs, adopt a policy of discriminating against economic strikers for the purpose of punishing them. Unlike *Potlatch,* this is precisely what respondent sought to do in the instant case. As the Board noted (R. 23, n. 6), "Potlatch advocated 'strike seniority' before the strike was settled" and "adopted that policy at the time of settlement" (189 F. 2d at 86). In this case, as the Board found (R. 23), respondent did not change its seniority policy until after the strike and, as shown below, its purpose in reducing or abolishing the seniority of the strikers was to punish them for striking and not to continue its business. Thus, respondent did not prepare its new seniority list until after March 18, 1954, more than three

months after the end of the strike (*supra,* p. 5). The old 1952–53 seniority list remained posted after the strike and was used by respondent in recalling strikers during the balance of the 1953–54 season (*supra,* p. 7). Respondent did not advise any employee during the strike that strike seniority would be granted and did not mention any loss of seniority to those strikers offered reinstatement after the strike (*supra,* p. 6). Its personnel chief, who was most closely associated with carrying out respondent's seniority policy, was not apprised of the new policy until February 1954 (*supra,* p. 7). In view of these facts the Board was fully warranted in concluding that respondent did not adopt its new seniority until after the strike was over (R. 23).

While General Manager Wright testified that during the strike he told the employees who remained at work, and the few replacements who expressed concern over their job security, that they had become the "nucleus of our work force" and gave them "assurance that they would be maintained if and when the strike was terminated" (*supra,* p. 6), the Board concluded that respondent merely intended to assure these employees that respondent would not yield to demands that they be discharged at the conclusion of the strike to make room for strikers (R. 21). That this was the extent of the "assurance" given these employees, and that respondent did not at this time intend thereby to give the nonstrikers superseniority which would give them priority of employment in future seasons, is clearly indicated by General Manager Wright's testimony above quoted, as

to the nature of the "assurance" given. The Board's conclusion in this regard is confirmed by the facts detailed in the preceding paragraph respecting respondent's hiring practices during and after the strike.

As indicated above, the facts of this case are on all fours with those of the *Olin* case (232 F. 2d 158 (C. A. 4), affirmed, 353 U. S. 1020), holding that conduct closely analogous to that in the case at bar was violative of Section 8 (a) (3) and (1) of the Act.

As stated in the opinion of the Court, the question presented was whether "the Company violated Section 8 (a) (3) and (1) of the Act by changing its seniority policy after a strike to give preference to nonstrikers and to employees who had returned to work during the strike" (232 F. 2d at 159). The Court held that the Company in promulgating its superseniority policy, "after the strike, when there was no necessity for such action to keep its plan in operation," was "clearly penalizing the strikers for exercising their right to strike," and that such conduct was not sanctioned by the *Mackay* case (232 F. 2d, at 160–161).

Here, as in *Olin,* respondent did not adopt its super seniority policy until after the strike was over. This circumstance alone lends support to the Board's finding that respondent was "clearly penalizing the strikers for exercising their right to strike." The punitive purpose underlying respondent's new policy which was given concrete expression in the March 18 seniority list, is further demonstrated, moreover, by respondent's treatment of the strikers who were no

recalled after the strike. Instead of reducing their seniority, which might have been consistent with giving nonstrikers preferential tenure, respondent by excluding these strikers from the list altogether, in effect, discharged them, and thereby destroyed their preferential position over new applicants for employment in future seasons.[18] Discrimination in favor of future applicants, as the Trial Examiner noted (R. 63–64), "could have had nothing to do with the successful prosecution of Respondent's business during the strike, and the Respondent did not claim that it did." The fact that this discrimination was without economic justification, as the Board stated (R. 19), is persuasive evidence of respondent's unlawful motivation in depriving the returned strikers of their pre-strike seniority. In addition, respondent's refusal to bargain on the grounds that the 12 strikers who refused night work were no longer employees—a position which is wholly inconsistent with respondent's own past practice—demonstrates respondent's hostility toward the Union and underscores the unlawful purpose behind respondent's action in reducing the strikers' seniority status. As the Board noted (R. 20), "Such clear and unwarranted violations of the Act cannot be ignored in assessing Respondent's motivation for an additional act of dis-

[18] In hiring employees for the 1954–55 season, respondent followed the pre-strike seniority list after exhausting the March 8 list and before hiring persons not previously employed. The Trial Examiner found, however, that respondent did so because of the pendency of the instant unfair labor practice proceeding and not because it considered these employees entitled to any preferential status (R. 65; 291–292, 268–269).

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crimination occurring exactly at the same time and by exactly the same means."

CONCLUSION

For the reasons stated, it is respectfully submitted that the Board's order should be enforced in full.

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MARCH 1958.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 65 Stat. 601, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, * * *

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

* * * * *

Representatives and Elections

Sec. 9. (a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the ex-

clusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: * * *

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof:

(c) (1) Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board—

(A) by an employee or group of employees or any individual or labor organization acting in their behalf alleging that a substantial number of employees (i) wish to be represented for collective bargaining and that their employer declines to recognize their representatives as the representative defined in section 9 (a) * * *

the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for an appropriate hearing upon due notice. Such hearing may be conducted by an officer or employee of the regional office, who shall not make any recommendations with respect thereto. If the Board finds upon the record of such hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.

* * * * *

(4) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation for the purpose of a consent election in conformity with regulations and rules of decision of the Board.

* * * * *

(d) Whenever an order of the Board made pursuant to section 10 (c) is based in whole or in part upon facts certified following an investigation pursuant to subsection (c) of this section and there is a petition for the enforcement or review of such order, such certification and the record of such investigation shall be included in the transcript of the entire record required to be filed under section 10 (e) or 10 (f), and thereupon the decree of the court enforcing, modifying, or setting aside in whole or in part the order of the Board shall be made and entered upon the pleadings, testimony, and proceedings set forth in such transcript.

SEC. 10. * * *

* * * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States * * * within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transacript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency,

shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

* * * * *

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